No. 01-1107

Supreme Court, U.S.
FILED
SEP 6 2002
CLERK

In The

Supreme Court of the United States

COMMONWEALTH OF VIRGINIA,
Petitioner,

v.

BARRY ELTON BLACK; RICHARD J. ELLIOTT; JONATHAN O'MARA,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF VIRGINIA

BRIEF ON MERITS FOR RESPONDENTS

Rodney A. Smolla
Counsel of Record
T.C. Williams School of Law
University of Richmond
Richmond, Virginia 23173
(804) 289-8197

Rebecca K. Glenberg
Legal Director,
American Civil Liberties Union
of Virginia
6 North Sixth Street, Suite 400
Richmond, Virginia 23219
(804) 644-8080

David P. Baugh
Sara G. Davis
Law Offices of David P. Baugh
233 South Cherry Street
Richmond, Virginia 23241
(804) 643-8111

James O. Broccoletti
Zoby & Broccoletti, P.C.
6663 Stoney Point South
Norfolk, Virginia 23520
(757) 466-0750

Kevin E. Martingayle
Stallings & Richardson, P.C.
2101 Parks Avenue, Suite 801
Virginia Beach, Virginia 23451
(757) 422-4700

Counsel for Respondents

THE LEX GROUP • 1108 East Main Street • Suite 1400 • Richmond, VA 23219
(804) 644-4419 • (800) 856-4419 • Fax: (804) 644-3660 • www.thelexgroup.com

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iv

STATEMENT OF THE CASE 1

SUMMARY OF ARGUMENT 3

ARGUMENT 6

I. The Virginia Cross-Burning Law Discriminates on the Basis of Content and Viewpoint 6

A. The Central Place of Symbolic Expression in First Amendment Jurisprudence 6

B. The Intent to Intimidate Element Does Not Cure the Content and Viewpoint Discrimination 11

C. The Statute's Speaker-Neutrality Does Not Render it Content-Neutral 14

D. The Alleged Lack of an Ulterior Motive to Censor does Not Render the Statute Content- or Viewpoint-Neutral 19

E. Many Adequate Content-Neutral Alternatives Are Available to Vindicate the State's Proffered Interests 22

II. The Cross-Burning Statute does Not Fall Within Any "Exception" to the First Amendment Presumptions Against Content and Viewpoint Discrimination 26

A. It is Wrong to Interpret *R.A.V.* as Establishing Three Specific Exceptions to the Presumption Against Content and Viewpoint Discrimination 26

B. The "Secondary Effects" Doctrine has no Place Here 27

C. The Cross-Burning Law Cannot be Saved as a Regulation of "Especially Virulent" Intimidation 29

D. The Law is Not Saved on the Theory that it was Not Passed to Suppress Ideas 37

III. The Prima Facie Evidence Provision Violates the First Amendment 39

A. The Prima Facie Evidence Provision Operates as an *In Terrorem* Chill on Protected Expression that Renders it Overbroad 39

B. The Prima Facie Evidence Provision Violates the Procedural Principle Established in *Stromberg v. California* Prohibiting General Verdicts that May have Been Based on Protected Symbolic Expression 41

C. The State May Not Through Fiat Brand a Specific Symbol as Presumptively Crossing the Constitutional Line that Separates Abstract Advocacy from Lawless Action 42

CONCLUSION 48

TABLE OF AUTHORITIES

Page(s)

Cases:

Abrams v. United States,
250 U.S. 616 (1919) 18, 39

Arkansas Writers' Project, Inc. v. Ragland,
481 U.S. 221 (1987) 19

Ashcroft v. Free Speech Coalition,
122 S.Ct. 1389 (2002) 41, 43

Bartnicki v. Vopper,
532 U.S. 514 (2001) 43

Beauharnais v. Illinois,
343 U.S. 250 (1952) 20, 21

Black v. Commonwealth of Virginia,
262 Va. 764, 553 S.E.2d 738 (2001) ..... *passim*

Boos v. Barry,
485 U.S. 312 (1988) 15, 28

Brandenburg v. Ohio,
395 U.S. 444 (1969) ..... *passim*

Broadrick v. Oklahoma,
413 U.S. 601 (1973) 40

Brown v. Louisiana,
383 U.S. 131 (1966) 8

Capitol Square Review and Advisory Bd. v. Pinette,
515 U.S. 753 (1995) 16

Chaplinsky v. New Hampshire,
315 U.S. 568 (1942) 29, 30, 31, 45

City of Erie v. Pap's A.M.,
529 U.S. 277 (2000) 28

City of Los Angeles v. Alameda Books, Inc.,
122 S.Ct. 1728 (2002) 28

Cohen v. California,
403 U.S. 15 (1971) ..... *passim*

Consolidated Edison Co. v. Public Service Commission,
447 U.S. 530 (1980) 15

Erznoznik v. City of Jacksonville,
422 U.S. 205 (1975) 14

Food Employees v. Logan Valley Plaza, Inc.,
391 U.S. 308 (1968) 8

Gitlow v. New York,
268 U.S. 652 (1925) 46

Gooding v. Wilson,
405 U.S. 518 (1972) 45

Herndon v. Lowry,
301 U.S. 242 (1937) 47

Hess v. Indiana,
414 U.S. 105 (1973) 43

Hustler Magazine v. Falwell,
485 U.S. 46 (1988) 31, 34

Joseph Burstyne, Inc., v. Wilson,
343 U.S. 495 (1952) 31

Kingsley Int'l Pictures Corp. v.
Regents of Univ. of N.Y.,
360 U.S. 684 (1959) 38

Landmark Communications v. Virginia,
435 U.S. 829 (1978) 47

Lee v. Weisman,
505 U.S. 577 (1992) 21

Lemon v. Kurtzman,
403 U.S. 602 (1971) 21, 22

Lewis v. City of New Orleans,
415 U.S. 130 (1974) 45

Lorillard Tobacco Co. v. Reilly,
533 U.S. 535 (2001) 28

Lynch v. Donnelly,
465 U.S. 668 (1984) 21

McIntyre v. Ohio Elections Commission,
514 U.S. 334 (1995) 15

Milkovich v. Loraine Journal Co.,
497 U.S. 1 (1990) 34

Miller v. California,
413 U.S. 15 (1973) 34

Minneapolis Star & Tribune Co. v.
Minnesota Comm'r of Revenue,
460 U.S. 575 (1983) 19

NAACP v. Claiborne Hardware Co.,
458 U.S. 886 (1982) 43

New York Times Co. v. Sullivan,
376 U.S. 254 (1964) 21, 31, 43

Park 'N Fly, Inc., v. Dollar Park and Fly, Inc.,
469 U.S. 189 (1985) 10

Philadelphia Newspapers v. Hepps,
475 U.S. 767 (1986) 34

R.A.V. v. City of St. Paul,
505 U.S. 377 (1992) ..... *passim*

Reno v. American Civil Liberties Union,
521 U.S. 844 (1997) 31

Renton v. Playtime Theatres, Inc.,
475 U.S. 41 (1986) 27, 28

Sable Communications of Cal., Inc. v. FCC,
492 U.S. 115 (1989) 31

Schacht v. United States,
398 U.S. 58 (1970) 9

Simon & Schuster, Inc., v. Members of the
New York State Crime Victims Board,
502 U.S. 105 (1991) 19

Smith v. Goguen,
415 U.S. 566 (1974) 9

Spence v. Washington,
418 U.S. 405 (1974) 9

Stanley v. Georgia,
394 U.S. 557 (1969) 31

State v. Ramsey,
430 S.E.2d 511 (S.C. 1993) 13

In re Steven S.,
31 Cal.Rptr.2d 644 (Cal. App. 1994) 26

Stromberg v. California,
283 U.S. 359 (1931) 9, 41, 42

Terminello v. Chicago,
337 U.S. 1 (1949) 14

Texas v. Johnson,
491 U.S. 397 (1989) ..... *passim*

Tinker v. Des Moines Independent Community School District,
393 U.S. 503 (1969) 8, 13-14

Towne v. Eisner,
245 U.S. 418 (1918) 11

United States v. Eichman,
496 U.S. 310 (1990) 9, 10, 21

United States v. Grace,
461 U.S. 171 (1983) 8

United States v. J.H.H.,
22 F.3d 821 (8th Cir. 1994) 25

United States v. O'Brien,
391 U.S. 367 (1968) 12, 13

United States v. Playboy Entertainment Group,
529 U.S. 803 (2000) 28

Watts v. United States,
394 U.S. 705 (1969) ..... *passim*

West Virginia Board of Education v. Barnette,
319 U.S. 624 (1943) 8

Whitney v. California,
274 U.S. 357 (1927) 14, 38, 47

Wisconsin v. Mitchell,
508 U.S. 476 (1993) 12, 23, 24, 36

Constitutional Provisions:

U.S. CONST. AMEND. I ..... *passim*

Statutes:

18 U.S.C. § 241 ..... 24, 25

42 U.S.C. § 1982 24

Fair Housing Act of 1968, 42 U.S.C. § 3631 ..... 24, 25

St. Paul, Minn. Legis. Code § 292.02 (1990) 6

Va. Code Ann. § 18.2-60(A) (1996) 23

Va. Code Ann. § 18.2-423 1

Va. Code Ann. § 18.2-423.01 ..... 22, 23

Va. Code Ann. § 18.2-423.1 11

Va. Code Ann. § 18.2-424 20

Miscellaneous:

T. Dixon, The Clansman:
An Historical Romance of the Ku Klux Klan
(1905) 16

Karl Lowenstein,
Legislative Control of Political Extremism in European Democracies,
38 Columbia L. Rev. 591 (1938)..... 20

W. Moore,
A Sheet and A Cross:
A Symbolic Analysis of the Ku Klux Klan
(Ph.D. dissertation, Tulane University, 1975)..... 17

M. Newton & J. Newton,
The Ku Klux Klan: An Encyclopedia
(1991) 16

David Reisman,
Democracy and Defamation,
42 Columbia L. Rev. 727 (1942)..... 20

Virginia General Assembly,
HB 1173 "Summary as Passed" 23

W. Wade, The Fiery Cross:
The Ku Klux Klan in America
(1987) 16

STATEMENT OF THE CASE

The Respondents Barry Elton Black, Richard J. Elliott, and Jonathan O'Mara were convicted of violating Virginia's cross-burning statute.[1] Barry Elton Black organized and led a Ku Klux Klan rally on August 22, 1998, in Carroll County, Virginia. The Klan rally was conducted on rural property with the permission of the landowner, who also participated in the rally. No one other than the participants in the rally was present on the property. The County Sheriff Warren Manning and his deputy Sergeant Richard Clark monitored the rally from an adjacent highway, to be sure that it would not get out of hand. J.A. 65, 70-71. A neighbor watched the rally from her porch. Several vehicles passed by the rally on the highway, and the occupants of one vehicle, an African-American family, briefly slowed to see what was going on, and then sped away. J.A. 97. During the rally the participants engaged in verbal attacks on various religious and racial groups, and on political figures, such as President Clinton and Hillary Clinton. J.A. 109. At the height of the rally a cross approximately 25 to 30 feet tall was ignited, visible from the highway, while the hymn *Amazing Grace* was played.

---

[1] The statute reads:

> It shall be unlawful for any person or persons, with the intent of intimidating any person or group of persons, to burn, or cause to be burned, a cross on the property of another, a highway or other public place. Any person who shall violate any provision of this section shall be guilty of a Class 6 felony.
>
> Any such burning of a cross shall be prima facie evidence of an intent to intimidate a person or group of persons.

VA. CODE ANN. § 18.2-423 (1996).

At trial Virginia produced three witnesses against Black, the arresting Sheriff, the Sheriff's Deputy, and Mrs. Rebecca Sechrist, who watched the events from her adjacent property. The Sheriff testified that there were no overtly threatening gestures or signs made by members of the Klan at the rally, that there were no weapons observed to be present, and that he did not perceive any threat of imminent bodily injury to himself, or feel that he was going to be attacked. J.A. 78-79. Mrs. Sechrist testified at length regarding her reaction to the events, and in the course of that testimony she described her feelings as being "scared" and as feeling "awful" and "terrible." J.A. 110. Mrs. Sechrist's testimony is most fairly characterized, however, not as demonstrating any sense of fear of bodily injury directed to her, but rather as a more generalized loathing arising from her disgust with the Klan ritual.[2]

The prosecutions of Richard J. Elliott and Jonathan O'Mara arose from an incident in the City of Virginia Beach on May 2, 1998. James Jubilee, an African-American, was a neighbor of Elliott's. Jubilee complained to Elliott about the discharge of firearms in Elliott's backyard. After discussing Jubilee's complaint with O'Mara and a third person, David Targee, at a party at Targee's home, Elliott, O'Mara, and Targee hastily constructed a small wooden cross in Targee's garage. They went to Jubilee's home, planted the cross in his back yard, and lit the cross. Jubilee found the charred remains of the cross when he awoke the following morning.

---

[2] J.A.110 ("Oh, it made me feel awful. It, they all walked around and then they would go in one circle and say things and then they would go around in another circle and say things and then they went up and all met at the bottom of the cross and lit it and played *Amazing Grace* and I tell you what, I was just, it was just terrible. It was terrible to see, that, when they were talking about random shooting black people and all, the guy that said it and everything talked about killing people and then get up there and said that when he died, he knowed, that he was a good Christian and when he died, he knowed he was going to heaven and then to burn the cross like that, I just, I just, I couldn't begin to put in words how I felt. I cried, I sat there and I cried. I didn't know what was going to happen between everything going on. It was just terrible.").

No one in the Jubillee family actually witnessed the burning of the cross.[3]

The Supreme Court of Virginia heard oral argument in all three cases on the same day, and in a consolidated opinion reversed all three convictions, holding that the Virginia cross-burning statute was unconstitutional on its face. *Black v. Commonwealth of Virginia*, 262 Va. 764, 553 S.E.2d 738 (2001), J.A 269.

SUMMARY OF ARGUMENT

Virginia's cross-burning law discriminates on the basis of content and viewpoint within the meaning of this Court's ruling in *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992). Content and viewpoint discrimination may reside in laws that target a particular symbol, such as the cross, or a distinct expressive ritual, such as the burning of the cross, whether or not the statute additionally uses language to single out any specific ideological viewpoint. To deny that a law targeting a symbol may be content- or viewpoint-based is to deny the central role that symbols play in human communication, and the central place of symbolic speech in First Amendment jurisprudence. If the government is permitted to select one symbol for banishment from public discourse there are few limiting principles to prevent it from selecting others. And it is but a short step from the banning of offending symbols such as burning crosses or burning flags to the banning of offending words.

---

[3] Pursuant to a plea agreement, O'Mara pled guilty to attempted cross burning and conspiracy to commit cross burning, and was sentenced to 90 days in jail and a $2500 fine on each charge, with part of the time and fines suspended. Under the plea agreement, O'Mara retained the right to appeal the constitutionality of Virginia's cross-burning law. Elliott was also charged with attempted cross-burning and conspiracy to commit cross-burning. Upon his plea of not guilty, a jury found him guilty of attempted cross-burning, but not guilty of conspiracy. Elliott was sentenced to 90 days in jail and was fined $2500.

The "intent to intimidate" provision of the cross-burning statute does not cure the content and viewpoint discrimination. Nor is the law saved merely because it does not discriminate among speakers, or was not enacted exclusively to suppress the Ku Klux Klan or its agenda. The inquiry into whether a law is content-based or viewpoint-based does not focus on the ultimate objective of the government, but on a more immediate and visible question, which is whether the *means* of regulation is related to the content of expression. Try as it might, Virginia cannot take the burning cross out of its cross-burning law, or escape the plain fact that it is Virginia's concern with the communicative impact of cross-burning that animates the statute's existence.

Virginia has adequate content-neutral alternatives to accomplish its objectives. The First Amendment does not protect threats or intimidation. Neutral laws proscribing intimidation exist in Virginia, and throughout the nation, and may in appropriate circumstances be invoked to prosecute cross-burning. Similarly, hate *crime* laws are constitutional, such as laws that enhance penalties for crimes (including threats or intimidation) motivated by racial animus or other biased intent. The focus here is not on the *act* of cross-burning, which may in appropriate circumstances be punished by society, but on the nature of the *laws* under which cross-burning may be prosecuted. As this Court observed in *R.A.V.*, the government has "sufficient means at its disposal to prevent such behavior without adding the First Amendment to the fire." *R.A.V.*, 505 U.S. at 396.

The cross-burning law cannot be defended under any "exception" to the First Amendment principles emanating from *R.A.V.* It is not targeted at the "secondary effects" of cross-burning. Nor can it be defended simply as an "especially virulent" form of intimidating speech, or as an example of a subclass of speech proscribed for the same

reasons that the general class of threatening or intimidating speech may be proscribed.

The prima facie evidence provision of the statute compounds its unconstitutionality, exacerbating its content and viewpoint discrimination, enabling Virginia to obtain convictions through shortcuts the First Amendment does not allow, and operating as an *in terrorem* prosecutorial threat that chills a substantial range of constitutionally protected expression, rendering it overbroad.

A central distinction in modern First Amendment law is the line that divides mere "abstract advocacy" from actual lawless action. In dealing with the relationship between violent speech and violent action, modern First Amendment jurisprudence employs a variety of legal doctrines that work in essentially parallel ways to separate mere violent rhetoric from speech closely intertwined with violence. The incitement standard of *Brandenburg v. Ohio*, 395 U.S. 444 (1969), the "fighting words" doctrine as it has now been narrowed through holdings such as *Cohen v. California*, 403 U.S. 15 (1971), and the "true threat" doctrine of *Watts v. United States*, 394 U.S. 705 (1969), all operate in much the same fashion, working in combination to protect violent or offensive rhetoric while permitting the government to move against speech connected in some more direct and palpable sense to violent conduct.

The core flaw of the prima facie evidence provision is that it short-circuits this central First Amendment distinction, effectively extracting the teeth from the intent to intimidate, transforming the intent element into a "now you see it now you don't" requirement. Under the Virginia statute, law enforcement officers, prosecutors, trial judges, and juries are instructed that nothing beyond the mere burning of the cross is *required* to sustain an arrest, prosecution, or conviction. This affronts the First Amendment in a deeply offensive way, permitting the government to "brand" certain speech as presumptively

taboo in public discourse, attaching legal penalties to its mere utterance or display.

ARGUMENT

I. THE VIRGINIA CROSS-BURNING LAW DISCRIMINATES ON THE BASIS OF CONTENT AND VIEWPOINT

A. The Central Place of Symbolic Expression in First Amendment Jurisprudence

Out of all the objects in the world that might be set on fire, Virginia's cross-burning law selected only a burning cross for unique treatment. At the highest level of abstraction a cross is an object or symbol of a particular shape: a vertical pole traversed by a horizontal bar. There certainly is nothing in this geometric configuration of the vertical and horizontal that carries any peculiarly dangerous potency. It is not the fire that burns hotter when flaming sticks are crossed, but the passions that the fire inflames.

In *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992), this Court struck down an ordinance of St. Paul Minnesota that provided:

> Whoever places on public or private property a symbol, object, appellation, characterization or graffiti, including, but not limited to, a burning cross or Nazi swastika, which one knows or has reasonable grounds to know arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender commits disorderly conduct and shall be guilty of a misdemeanor.

R.A.V., 505 U.S. at 380, *quoting* St. Paul, Minn. Legis. Code § 292.02 (1990). This Court held that "the ordinance goes even

beyond mere content discrimination, to actual viewpoint discrimination." *Id.* at 391.

When distilled to its essence, Virginia's position is that viewpoint and content discrimination exist only in laws that single out an identifiable perspective on the ideological or political spectrum. Virginia thus views this Court's condemnation of content-based and viewpoint-based discrimination is *R.A.V.* as residing *exclusively* in the language of the St. Paul ordinance requiring that the symbolic speech (such as burning a cross) be of the type "which one knows or has reasonable grounds to know arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender." *R.A.V.*, 505 U.S. at 380.

Content and viewpoint discrimination, however, may reside in laws that target a specific symbol, such as the cross, or a specific expressive ritual, such as the burning of the cross. To deny that a law targeting a symbol may be content- or viewpoint-based is to deny the central role that symbols play in human communication, and the central place of symbolic speech in First Amendment jurisprudence:

> Symbolism is a primitive but effective way of communicating ideas. The use of an emblem or flag to symbolize some system, idea, institution, or personality, is a short cut from mind to mind. Causes and nations, political parties, lodges and ecclesiastical groups seek to knit the loyalty of their followings to a flag or banner, a color or design. The State announces rank, function, and authority through crowns and maces, uniforms and black robes; the church speaks through the Cross, the Crucifix, the altar and shrine, and clerical raiment. Symbols of State often convey political ideas just as religious symbols come to convey theological ones. . . .

> A person gets from a symbol the meaning he puts into it, and what is one man's comfort and inspiration is another's jest and scorn.

West Virginia Board of Education v. Barnette, 319 U.S. 624, 632 (1943).

Certain symbols--the American Flag, the Star of David, the Cross, the swastika--exude powerful magnetic charges, positive and negative, and are often invoked to express beliefs and emotions high and low, sublime and base, from patriotism, faith, or love to dissent, bigotry, or hate. Symbolic expression is often combined with group expression, such as sit-ins, meetings, marches, or rallies. *See, e.g, Brown v. Louisiana*, 383 U.S. 131, 141-142 (1966) (civil rights sit-in to protest segregation); *Food Employees v. Logan Valley Plaza, Inc.*, 391 U.S. 308, 313-14 (1968) (labor picketing); *United States v. Grace*, 461 U.S. 171, 176 (1983) (striking down law prohibiting displaying in the Supreme Court building or on its grounds any flag, banner, or device designed or adapted to bring into public notice any party, organization, or movement). Symbolic expression may be relatively simple and passive, such as the wearing of a black armband to protest the war in Vietnam. *See Tinker v. Des Moines Independent Community School District*, 393 U.S. 503, 505 (1969) (sustaining First Amendment right of student to wear armband at school). Quite often, however, symbolic expression is far more incendiary and graphic. Symbolic expression may involve either the consecration or the desecration of a symbol. A flag may be proudly waved or angrily defiled, a cross may be reverently worshiped or wrathfully burned. The destruction or defilement of a symbol is often the method through which a speaker communicates the intensity of the message, which may

frequently be a message defiant of authority or disrespectful of mainstream values and sensibilities.[4]

If this Court were to draw a distinction between the St. Paul ordinance struck down in *R.A.V.* and the Virginia cross-burning statute, a dramatic and dangerous rift would suddenly be created in First Amendment law, a rift treating articulated verbal content discrimination (such as that in *R.A.V.*) as different *in kind* from symbolic content discrimination. Symbolic expression would thereby be rendered a second-class First Amendment citizen. Decades of First Amendment cases are aligned against any such move.[5]

Cross-burning is a shorthand, as all symbolic speech is a shorthand, speaking heart-to-heart and mind-to-mind. The central principle animating the First Amendment is that the government may not censor speech on the basis of viewpoint, and this principle is as important in the context of symbols as it is in the context of language. Cross-burning, like flag-burning, is undoubtedly offensive and

---

[4] *See, e.g., Texas v. Johnson*, 491 U.S. 397 (1989) (striking down conviction for burning the American flag); *United States v. Eichman*, 496 U.S. 310 (1990) (same); *Schacht v. United States*, 398 U.S. 58 (1970) (sustaining right of actor to wear army uniform in anti-war theatrical presentation staged in front of a recruiting center); *Stromberg v. California*, 283 U.S. 359 (1931) (striking down conviction for displaying of red flag to protest against government); *Smith v. Goguen*, 415 U.S. 566 (1974) (striking down conviction for treating flag contemptuously by wearing pants with small flag sewn into their seat); *Spence v. Washington*, 418 U.S. 405 (1974) (First Amendment protected display of flag with peace symbol superimposed upon it).

[5] *See Cohen v. California*, 403 U.S. 15, 25 (1971) ("First, the principle contended for by the State seems inherently boundless. How is one to distinguish this from any other offensive word? Surely the State has no right to cleanse public debate to the point where it is grammatically palatable to the most squeamish among us. Yet no readily ascertainable general principle exists for stopping short of that result were we to affirm the judgment below. For, while the particular four-letter word being litigated here is perhaps more distasteful than most others of its genre, it is nevertheless often true that one man's vulgarity is another's lyric.").

disturbing to most citizens. Yet "[i]f there is a bedrock principle underlying the First Amendment, it is that the Government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." *Texas v. Johnson*, 491 U.S. 397, 414 (1989). *See also United States v. Eichman*, 496 U.S. 310 (1990). The Constitution protects not only the analytic vocabulary of the mind but the inarticulate speech of the heart. *See Cohen v. California*, 403 U.S. at 26 ("much linguistic expression serves a dual communicative function: it conveys not only ideas capable of relatively precise, detached explication, but otherwise inexpressible emotions as well. . . words are often chosen as much for their emotive as their cognitive force. We cannot sanction the view that the Constitution, while solicitous of the cognitive content of individual speech has little or no regard for that emotive function which practically speaking, may often be the more important element of the overall message sought to be communicated.").

Virginia in effect claims that a burning cross has acquired a kind of "secondary meaning" in which it is routinely understood as an illegal threat of violence. But this is not trademark law. This is not the invocation of secondary meaning to avoid consumer confusion in the regulation of the sale of goods or services within the marketplace of commerce.[6] This is free speech law. This is the invocation of secondary meaning in the service of censorship, regulating traffic in one discrete expressive symbol within the marketplace of ideas.

Virginia seems to believe that it may browse the universe of symbols, passing laws targeting those it does not like. In the same section of its statutory code that contains the cross-burning law, for example, Virginia has enacted a

[6] *See Park 'N Fly, Inc., v. Dollar Park and Fly, Inc.*, 469 U.S. 189 (1985).

provision, worded identically, targeting swastikas.[7] Yet a burning cross cannot be made a form of expressive contraband. The state cannot by fiat brand this one symbol as taboo, eliminating its use in social discourse. The government may no more single out a burning cross for especially disfavorable legal treatment than it may single out a burned or mutilated American flag, or the likeness of Osama bin Laden, or a swastika.

To go down the road suggested by Virginia would be perilous business, for if the government is permitted to select one symbol for banishment from public discourse there are few limiting principles to prevent it from selecting others. And it is but a short step from the banning of offending symbols such as burning crosses or flags to the banning of offending words. A word is, after all, but a symbol itself, "the skin of a living thought."[8]

B. The Intent to Intimidate Element Does Not Cure the Content and Viewpoint Discrimination

Virginia and its supporting *amici* incessantly repeat the mantra that the Virginia law requires an intent to

[7] A law may thus be judged by the company it keeps. In 1983 Virginia's cross-burning statute was amended to add a second prohibition, worded and structured identically to the cross-burning provision, but targeted at swastikas. VA. CODE ANN. § 18.2-423.1 (1996). ("It shall be unlawful for any person or persons, with the intent of intimidating another person or group of persons, to place or cause to be placed a swastika on any church, synagogue or other building or place used for religious worship, or on any school, educational facility or community center owned or operated by a church or religious body. A violation of this section shall be punishable as a Class 6 felony. For the purposes of this section, any such placing of a swastika shall be prima facie evidence of an intent to intimidate another person or group of persons.").

[8] *See Towne v. Eisner*, 245 U.S. 418, 425 (1918) (Holmes, J.) ("A word is not a crystal, transparent and unchanged, it is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used.").

intimidate. But the point of *R.A.V.* is that it does not matter. A law banning "fighting words" is permissible, but not a law banning "racist fighting words." A law banning intimidation is permissible if the concept of "intimidation" is sufficiently confined, but not a law banning "intimidation-through-cross-burning." *R.A.V.* teaches that viewpoint-neutrality is a First Amendment prime, a dynamic requirement that cuts across all other First Amendment doctrines. *R.A.V.*, 505 U.S. at 391-92. The content and viewpoint discrimination in Virginia's cross-burning law inheres in the prohibition of cross-burning alone. Virginia's labored effort to convince this Court that the statute's exclusive focus on burning crosses is *not* content-based ultimately collapses on itself and dissolves into incoherence, for the statute only makes logical sense if it is construed as driven by Virginia's concern with *what is communicated* when a cross is burned.

Virginia's cross-burning law is not a criminal statute of general applicability, proscribing palpable conduct that causes or threatens physical harm without reference to any form of expression. *See Wisconsin v. Mitchell*, 508 U.S. 476 (1993) (sustaining penalty-enhancement hate crime law unrelated to expression). Nor is it a law enacted for reasons other than the communicative impact of a message, that has the mere incidental effect of chilling some forms of expression, the type of law that qualifies for intermediate scrutiny under the test of *United States v. O'Brien*, 391 U.S. 367 (1968). The difference between cases governed by decisions such as *Texas v. Johnson*, 491 U.S. 397 (1989) (flag-burning) or *R.A.V.* (cross-burning) and cases governed by *O'Brien* (draft-card burning) is the difference between content based and content-neutral regulation. When the government makes it a crime to burn a flag or burn a cross it is *only* concerned with what is communicated by such burning. When the government makes it a crime to burn a draft card it may plausibly cite reasons unrelated to what is

communicated, such as the orderly administration of the draft. *O'Brien*, 391 U.S. at 381-82.

Try as it might, Virginia cannot read the burning cross out of its cross-burning law. Even cross-burning laws that are otherwise constitutional violate the First Amendment simply and completely because they *are* cross-burning laws.[9] Any suggestion that cross-burning is *intrinsically* intimidating is wordplay.[10] It may well be that most Americans of good will are repulsed by the sight of a burning cross, as they are repulsed by the site of a burning flag. In a general sense, many persons might describe their emotions on seeing the sight of a burning cross (or other rituals of the Ku Klux Klan or similar groups) as filling them with "fear" or "loathing." Many might say that they feel "intimidated" or "scared" by such rituals, as did Mrs. Sechrist, a witness who testified in the Black trial. J.A. 110. Those who are members of groups that have been the special target of the Klan's bigotry or violence may well feel these emotions with special poignancy and intensity. Yet this is not the kind of disturbance from which citizens in this society may demand the law's shelter. Such "undifferentiated fear or apprehension of disturbance . . . is not enough to overcome the right to freedom of expression." *Tinker v. Des Moines Independent Community School District*,

---

[9] *See State v. Ramsey*, 430 S.E.2d 511, 514 (S.C. 1993) (applying *R.A.V.* to strike down cross-burning law, stating that: "The State urges us to construe section 16-7-120 as proscribing 'fighting words.' We discern that we cannot cure the unconstitutionality of section 16-7-120 by such a construction. Like the Minnesota statute, section 16-7-120 does not completely prohibit the use of fighting words; rather, it prevents only the use of those fighting words symbolically conveyed by burning a cross. The government may not selectively limit speech that communicates, as does a burning cross, messages of racial or religious intolerance.").

[10] *See R.A.V.* 505 U.S. at 392-93 (1992) ("This is wordplay. What makes the anger, fear, sense of dishonor, etc., produced by violation of this ordinance distinct from the anger, fear, sense of dishonor, etc., produced by other fighting words is nothing other than the fact that it is caused by a distinctive idea, conveyed by a distinctive message.").

393 U.S. at 508. "[A] function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger." *Terminiello v. Chicago*, 337 U.S. 1, 4 (1949). Much of the speech in an open society, particularly speech coming from the fringes, will be offensive, coarse, disturbing, or loathsome. Under our First Amendment traditions, however, the "fitting remedy for evil counsels is good ones." *Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring). Rather than censor the offending speaker, our Constitution requires the offended viewer to avert his eyes.[11]

C. The Statute's Speaker-Neutrality Does not Render it Content-Neutral

Virginia argues that the cross-burning statute is content- and viewpoint-neutral because it does not matter who burns the cross. This is fighting a straw-man, conflating content discrimination with speaker discrimination. In *Texas v. Johnson* this Court rejected this very argument, noting that the Texas statute at issue was inherently viewpoint-based, even though it applied evenly to any person or group who desecrated the flag, from whatever political perspective. *Texas v. Johnson*, 491 U.S. at 413 n.9. ("If Texas means to suggest that its asserted interest does not prefer Democrats over Socialists, or Republicans over Democrats, for example, then it is beside the point, for Johnson does not rely on such an argument. . . . Thus, if

[11] *See, e.g., Erznoznik v. City of Jacksonville*, 422 U.S. 205, 212 (1975) (striking down ordinance seeking to keep certain sexually explicit films at drive-in movies "from being seen from public streets and places where the offended viewer readily can avert his eyes"); *Cohen v. California*, 403 U.S. 15, 21 (1971) (striking down conviction for wearing vulgar "fuck the draft" message on a jacket in a public area because offended viewers could "effectively avoid further bombardment of their sensibilities simply by averting their eyes.").

Texas means to argue that its interest does not prefer *any* viewpoint over another, it is mistaken; surely one's attitude toward the flag and its referents is a viewpoint."). That Virginia's law reaches all cross-burning thus does not mitigate the offense to the First Amendment. Americans have the right to use symbols freely to communicate, to wave flags or trample on them, to worship crosses or burn them.[12]

On this point the opinion for the Supreme Court of Virginia written by Justice Donald Lemons evidenced deep concern for a contradiction that runs inherently and pervasively throughout Virginia's argument. *Black v. Commonwealth of Virginia*, 262 Va. 764, 776, 553 S.E.2d 738, 745 (2001), J.A 282. Virginia repeatedly insists that the history of concern with Ku Klux Klan violence that indisputably precipitated passage of the law does not render the law content or viewpoint based, because the naked text of the law reaches *all* cross-burning. Yet Virginia's insistence that cross-burning and intimidation are essentially equivalent, so that cross-burning is deemed either inherently intimidating, or at least usually intimidating, is based entirely on Virginia's invocation of our societal experience with cross-burning, and principally with cross-burning as a ritual practice of the Ku Klux Klan. The Supreme Court of Virginia cogently observed that the State "cannot have it both ways," ignoring the history of cross-burning in one part of its argument and invoking it in the next. *Id.*

[12] *See also McIntyre v. Ohio Elections Commission*, 514 U.S. 334, 345 (1995)("[E]ven though this provision applies evenhandedly to advocates of differing viewpoints, it is a direct regulation of the content of speech"); *Boos v. Barry*, 485 U.S. 312, 319 (1988) ("we have held that a regulation that 'does not favor either side of a political controversy' is nonetheless impermissible because the 'First Amendment's hostility to content-based regulation extends . . . to prohibition of public discussion of an entire topic.'") *quoting Consolidated Edison Co. v. Public Service Comm'n*, 447 U.S. 530, 537 (1980).

Virginia's history, of course, is far from unique. Cross-burning has long been a well-recognized ritual of the Ku Klux Klan, a symbol with intense political and religious resonance, often communicating hatred. Justice Thomas explained the symbolic significance of cross-burning in *Capitol Square Review and Advisory Bd. v. Pinette*, 515 U.S. 753 (1995), and his observations are worth considering here at length:

> In Klan ceremony, the cross is a symbol of white supremacy and a tool for the intimidation and harassment of racial minorities, Catholics, Jews, Communists, and any other groups hated by the Klan. The cross is associated with the Klan not because of religious worship, but because of the Klan's practice of cross burning. Cross burning was entirely unknown to the early Ku Klux Klan, which emerged in some Southern States during Reconstruction. W. Wade, THE FIERY CROSS: THE KU KLUX KLAN IN AMERICA 146 (1987). The practice appears to have been the product of Thomas Dixon, whose book *The Clansman* formed the story for the movie, THE BIRTH OF A NATION. See M. Newton & J. Newton, THE KU KLUX KLAN: AN ENCYCLOPEDIA 145-146 (1991). In the book, cross burning is borrowed from an "old Scottish rite" (Dixon apparently believed that the members of the Reconstruction Ku Klux Klan were the "reincarnated souls of the Clansmen of Old Scotland") that the Klan uses to celebrate the execution of a former slave. T. Dixon, THE CLANSMAN: AN HISTORICAL ROMANCE OF THE KU KLUX KLAN 324-326 (1905). . . To be sure, the cross appears to serve as a religious symbol of Christianity for some Klan members. The hymn "The Old Rugged Cross" is sometimes played during cross burnings. See W. Moore, *A Sheet and a Cross: A Symbolic Analysis of the Ku Klux Klan* 287-288 (Ph.D. dissertation, Tulane University, 1975). But to the extent that the Klan had a message to communicate in Capitol Square, it was primarily a political one. . . .Of course, the cross also had some religious connotation; the Klan leader linked the cross to what he claimed was one of the central purposes of the Klan: "to establish a Christian government in America." *Id.*, at 142-145. . . . The Klan simply has appropriated one of the most sacred of religious symbols as a symbol of hate.

Id. at 770-71 (Thomas, J., concurring). As this passage explains, the burning cross is often a *tool* for intimidation and harassment. No one disputes that. But it is not a tool in the same sense that a gun or a knife is a tool. The burning cross is a *symbol*, and as Justice Thomas in *Pinette* explained, it is a symbol with a variety of connotations relating to race, religion, politics, and prejudice.

Again it should be emphasized that neither Barry Elton Black, who is a Klan leader, nor Richard J. Elliott and Jonathan O'Mara, who have no affiliation with the Klan, claim that the constitutional infirmity of the Virginia cross-burning law resides in any deliberate intent by the Virginia legislature to suppress the Klan or its ideological agenda. Nor was this the holding of the Supreme Court of Virginia below. Rather, as the Supreme Court of Virginia correctly reasoned, the difficulty with the Virginia cross-burning statute is not that it is calculated to suppress the Ku Klux Klan or a message of white supremacy, but that it seeks to suppress one symbol laden with many communicative emanations and meanings. As the Supreme Court of

Virginia understood, the cross is not just any geometric shape, a vertical pole traversed by a horizontal bar. The cross is a symbol steeped in meaning, and cross-burning is a ritual steeped in expression.

The Supreme Court of Virginia thus correctly emphasized that the cross-burning law focused on one form of symbolic speech, a burning cross, leaving other geometric configurations, such as circles and squares, untouched. *Black*, 262 Va. at 776, 553 S.Ed.2d at 745, J.A. 281. Somewhat derisively, the State chides the Supreme Court of Virginia on this issue, reasoning that the legislature cannot be faulted for failing to include all symbols. Brief of Petitioner at 30 ("Perhaps, someday, somewhere, somebody in Virginia may intimidate someone--and simultaneously express an idea--by burning some geometric shape other than a cross. But such speculation does not make the current law invalid.").

Respectfully, it is the State of Virginia, not the Supreme Court of Virginia, that misses the point. Of course Virginia did not make it a crime to burn a circle or square. And why not? Because such a law would have targeted mere impotent gibberish.[13] In our societal experience burning circles and squares have acquired no meanings; to burn them would be fury signifying nothing, to ban such burning would be a silly and meaningless legislative act. So too, Virginia's ban on cross-burning is an act of legislative nonsense *unless* it is interpreted as grounded in what is communicated when the cross is ignited. In noting the law's failure to include benign symbols such as squares and circles the Supreme Court of Virginia thus persuasively

---

[13] *See Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) ("To allow opposition by speech seems to indicate that you think the speech impotent, as when a man says that he has squared the circle. . . .").

underscored the verisimilitude of its judgment that the law was content-based.[14]

D. The Alleged Lack of an Ulterior Motive to Censor does Not Render the Statute Content- or Viewpoint-Neutral

Virginia's elaborate effort to cleanse the legislative history of its statute of any invidious intent to discriminate against particular ideas is simply irrelevant. This repeats an error that permeates Virginia's entire argument, an error that confuses the question of the government's ultimate goal, which may be legitimate and altruistic, with its regulatory method, which may be content-based or viewpoint-based despite the purity of its motives. *See Simon & Schuster, Inc., v. Members of the New York State Crime Victims Board*, 502 U.S. 105, 117 (1991)("The Board next argues that discriminatory financial treatment is suspect under the First Amendment only when the legislature intends to suppress certain ideas. This assertion is incorrect; our cases have consistently held that '[i]llicit legislative intent is not the *sine qua non* of a violation of the First Amendment.'"), *quoting Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue*, 460 U.S. 575, 592 (1983). It is thus not necessary to adduce "'evidence of an improper censorial motive'" in order to make the case that Virginia's cross-burning law is content-based. *Id., quoting Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 228 (1987).

Virginia pushes a red-herring in its many ingenious attempts to explain its law as resting on something other

---

[14] *Black*, 262 Va. at 776, 553 S.Ed.2d at 745, J.A. 281. ("In an atmosphere of racial, ethnic, and religious intolerance, the General Assembly acted to combat a particular form of intimidating symbolic speech--the burning of a cross. It did not proscribe the burning of a circle or a square because no animating message is contained in such an act.").

than "political correctness."[15] Whether Virginia's legislature in 1952 was or was not racist, or whether Virginia's legislature in 1952 did or did not single-mindedly seek to suppress the Ku Klux Klan, are simply issues that do not matter, if the *means* chosen by the legislators to accomplish their mix of objectives and motivations, whatever they may have been, was geared to the content of speech.[16]

---

[15] When initially enacted in 1952 the statute could not have been motivated by a 1950s form of political correctness striving to suppress racism, Virginia argues, for the state legislature at the time was steeped in racial animus and committed to official segregation. Drawing on abortion protest cases, the State maintains that while it may well be that an uprise in cross burning incidents associated with the Ku Klux Klan did provide the political impetus for enactment of the law, and while members of the Ku Klux Klan then and now may be the persons most likely to be prosecuted under the law, the mere correlation between cross-burning and Klan activity does not render an otherwise neutral law unconstitutional.

[16] Indeed, from the perspective of 1952 it is quite possible that the cross-burning statute would not at the time have been construed as a violation of the First Amendment at all. Many of today's well-entrenched First Amendment principles and formal doctrines were not yet formed in the decisional law of 1952; from current perspectives free speech jurisprudence in 1952 was still relatively primitive. In 1952 this Court decided *Beauharnais v. Illinois*, 343 U.S. 250 (1952), upholding a criminal conviction for "group libel" against the leader of a racist Chicago organization known as the "White Circle League" merely for distributing racist leaflets. The Court's opinion, written by Justice Frankfurter, made oblique reference to the holocaust and Nazi Germany, stating that "Illinois did not have to look beyond her own borders or await the tragic experience of the last three decades to conclude that wilful purveyors of falsehood concerning racial and religious groups promote strife and tend powerfully to obstruct the manifold adjustments required for free, ordered life in a metropolitan, polyglot community." *Id.* at 258-59 (*citing* Karl Loewenstein, *Legislative Control of Political Extremism in European Democracies*, 38 Col.L.Rev. 591, 725 (1938); David Reisman, *Democracy and Defamation*, 42 Col.L.Rev. 727 (1942). The Virginia cross-burning statute partakes to some degree of the "group libel" motif of *Beauharnais*, in its language referring to intimidation of "*any group* of persons." VA. CODE ANN. § 18.2-424 (emphasis added). While *Beauharnais* has never been explicitly overruled, and while isolated passages from the case are still occasionally cited in opinions of this Court, clearly constitutional law has

To avoid the force of this settled principle, Virginia invites this Court to import from its Establishment Clause jurisprudence a methodology akin to that at times used to determine whether a law was or was not enacted for a "secular purpose."[17] But as this Court has observed, "[t]he First Amendment protects speech and religion by quite different mechanisms." *Lee v. Weisman*, 505 U.S. 577, 591 (1992). The Establishment Clause and the Free Speech Clause operate in different ways to accomplish different objectives. It is unsound to play First Amendment mix-and-match, borrowing isolated principles from religion cases such as *Lemon v. Kurtzman*, 403 U.S. 602 (1971), in an attempt to reformulate the structure of free speech law. It is true that in Establishment Clause cases this Court often begins its inquiry by first determining whether the law at issue is supported by a valid secular purpose. In Establishment Clause cases the identification of a legitimate secular purpose does not render the law home free, however, but

---

passed *Beauharnais* by. The holding in *Beauharnais* cannot be reconciled with a host of subsequent decisions, and the case has been effectively repudiated *sub silentio*. *See, e.g., New York Times Co. v. Sullivan*, 376 U.S. 254 (1964) (imposing First Amendment limitations on common-law libel actions); *Brandenburg v. Ohio*, 395 U.S. 444 (1969) (striking down conviction for racist Ku Klux Klan speech indistinguishable from that in *Beauharnais*); *Cohen v. California*, 403 U.S. 15 (1979) (striking down conviction for wearing message "fuck the draft" on a jacket); *Texas v. Johnson*, 491 U.S. 397 (1989) (striking down conviction for flag desecration); *United States v. Eichman*, 496 U.S. 310 (1990) (same). *Beauharnais* was mentioned in passing in *R.A.V.* itself, which cited *Beauharnais* as an example of the *incorrect* view that certain categories of expression, such as obscenity or defamation, are not speech "at all," or that First Amendment protection does not any sense extend to them. *See R.A.V.*, 506 U.S. at 377 (expressing disagreement with the "occasionally repeated shorthand" that these are "categories of speech entirely invisible to the Constitution.").

[17] See Brief of Petitioner at 24-25 (relying on cases such as *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971) and *Lynch v. Donnelly*, 465 U.S. 668, 680 (1984)).

merely advances the inquiry to the next stages of constitutional analysis. *Id.* at 612. In Speech Clause cases, in contrast, the underlying legislative purpose in an *ultimate* sense is rarely the principal focus, for the ulterior motive of the government is quite often legitimate, and indeed admirable, as when the ultimate goal is national security, or "law and order," or protection against violence, or compensation of crime victims. The inquiry into whether a law is content-based or viewpoint-based does not focus on this ultimate motive, but on a more immediate and visible question, which is whether the *means* of regulation employs devices that classify speech in reference to the content of its message. "It is not the State's ends, but its means, to which we object." *Texas v. Johnson*, 491 U.S. 397, 418 (1989).

E. Many Adequate Content-Neutral Alternatives Are Available to Vindicate the State's Proffered Interests

In *R.A.V.* this Court observed that the government has ample content-neutral and viewpoint-neutral methods of vindicating the governmental interests that hate speech laws seek to vindicate. *R.A.V.*, 505 U.S. at 395-96. The same array of neutral options are available to accomplish the purposes that undergird cross-burning laws. Virginia has itself recently enacted a content-neutral alternative to its cross-burning statute, thus proving the point. Virginia in July 2002 added to its laws a content-neutral response to the decision of the Supreme Court of Virginia in *Black* with a new provision, codified at VA. CODE. ANN. § 18.2-423.01, that avoids any mention of cross-burning, but merely

reaches intimidation effectuated through the burning of "an object."[18]

There are no valid governmental interests underlying cross-burning statutes that cannot be vindicated through content-neutral criminal laws. Laws of general applicability, proscribing palpable conduct that incites or threatens physical harm do not violate the First Amendment. *See* VA. CODE ANN. § 18.2-60(A) (general law proscribing threats to kill or do bodily harm). Beyond that, under this Court's ruling in *Wisconsin v. Mitchell*, 508 U.S. 476 (1993), hate *crime* laws, singling out for special

---

[18] This addition to Virginia's statutory code reads:

> A. Any person who, with the intent of intimidating any person or group of persons, burns an object on the private property of another without permission, is guilty of a Class 6 felony.
>
> B. Any person who, with the intent of intimidating any person or group of persons, burns an object on a highway or other public place in a manner having a direct tendency to place another person in reasonable fear or apprehension of death or bodily injury is guilty of a Class 6 felony.

VA. CODE. ANN. § 18.2-423.01. The passage of the new additional "burn any object" law did not render the Elliott, O'Mara, or Black convictions moot, nor did it moot the constitutional issue in any broader sense, because the new statute did not repeal or replace the existing cross-burning law, but instead created a new and additional statutory section, in an explicit reaction by the state legislature to the decision of the Supreme Court of Virginia in *Black v. Commonwealth*. The new "burn any object" law was codified in a different code section than the existing law, and the legislative history explicitly noted that it "[c]reates a new section without amending existing language in the current cross-burning statute. . . ." *See* Virginia General Assembly, HB 1173 "Summary as Passed" (2002).

punishment conduct undertaken out of biased motivation, are also constitutional.[19]

On this score the *amicus* Brief filed by the United States is illuminating. The United States devotes the bulk of its effort to explaining how the United States prosecutes acts of cross-burning under content-neutral federal statutes.[20] The Respondents accept as accurate the useful material submitted by the United States regarding the history of cross-burning in America. The Respondents also accept as sound the proposition that cross-burning, when conducted as an act of intimidation, threat, or incitement may be prosecuted under content-neutral state or federal laws such as those described by the United States.

The United States goes on to argue, however, that states should have additional authority to go beyond the federal model (a model duplicated in the laws of many states), and instead single out intimidation through cross-burning *as such*. Yet nothing in the arguments submitted by the United States, by Virginia, or by any of the State's supporting *amici* ever explains why neutral laws such as those employed by the United States or bias-motivation hate crime laws such as those approved by this Court in *Wisconsin v. Mitchell* will not do the trick.

---

[19] In addition, under *Wisconsin v. Mitchell* the mere evidentiary use of speech to establish the biased intent is not unconstitutional. Thus the government could introduce evidence that a trespasser burned a cross, or brandished a swastika, as *evidence* of the biased intent required to establish a violation of hate crimes law. *See Wisconsin v. Mitchell*, 508 U.S. at 477 ("The First Amendment, moreover, does not prohibit the evidentiary use of speech to establish the elements of a crime or to prove motive or intent.").

[20] See Brief of the United States as Amicus Curiae at 13-20 (describing prosecutions under provisions of the Fair Housing Act, 42 § 3631, and the criminal conspiracy section of the federal civil rights statute, 18 U.S.C. § 241, which is often invoked in tandem with 42 U.S.C. § 1982, which secures certain rights against race discrimination in relation to real and personal property.

The sum is stated but not the math. Virginia's law is defended as an effort to combat threats and intimidation, but it is never explained why general threat and intimidation statutes, or laws that single out bias-motivated conduct alone (and do not mention expressive activity or target specific symbols) are not entirely adequate to accomplish the proffered government objectives. The United States, for example, concedes that the Virginia statute is different in kind from the federal model. See Brief of the United States as Amicus Curiae at 22 ("The Virginia statute, in contrast to the federal statutes discussed above, applies to a single mode of intimidating conduct, intimidation by cross-burning. Cross-burning is not in all instances an expressive activity. . . . But by focusing on a particular type of activity that often is expressive of an idea or viewpoint, the Virginia statute, although directed at conduct, may require scrutiny under the First Amendment in a way that the federal statutes do not."). Nevertheless, the United States advances no policy or legal arguments for *why* states need to single out "activity that is often expressive of an idea or viewpoint."[21]

No claim is made that content-neutral laws are failing. Indeed, one need only look to the sequence of litigation in *R.A.V.* itself to see that they are not. The perpetrators of the cross-burning incident at issue in *R.A.V.* were subsequently charged under federal statutes (18 U.S.C. § 241, and 42 U.S.C. § 3631) and their convictions were affirmed, *see United States v. J.H.H.*, 22 F.3d 821 (8th Cir. 1994), precisely on the ground that the federal laws were content-neutral provisions making no mention of cross-burning or any other form of expressive activity.

---

[21] See Brief of the United States as Amicus Curiae at 22-27. Neither the United States nor any other of Virginia's supporting *amici* offer any argument beyond that invoked by Virginia.

II. THE CROSS-BURNING STATUTE DOES NOT FALL WITHIN ANY "EXCEPTION" TO THE FIRST AMENDMENT PRESUMPTIONS AGAINST CONTENT AND VIEWPOINT DISCRIMINATION

A. It is Wrong to Interpret *R.A.V.* as Establishing Three Specific Exceptions to the Presumption Against Content and Viewpoint Discrimination

Virginia argues that even if its cross-burning law is construed as content- or viewpoint-based, the statute remains valid under three "exceptions" purportedly established in *R.A.V.* Virginia claims that its cross-burning law is justified under the "secondary effects" exception allegedly acknowledged in *R.A.V.*; that the law proscribes only an "especially virulent" form of intimidation, in which the "the content discrimination consists of the very reason the entire class of speech at issue is proscribable," *R.A.V.* 505 U.S. at 387; and in a catch-all argument, that "the nature of the content discrimination is such that there is no realistic possibility that suppression of ideas is afoot." *Id.* at 390. Virginia then proceeds to interpret the three alleged exceptions so expansively that the net effect is to entirely marginalize the central and vital First Amendment principles *R.A.V.* embraced.[22]

---

[22] This interpretation of *R.A.V.* appears to have originated in a California state intermediate appellate court decision. *In re Steven S.*, 31 Cal.Rptr.2d 644, 651 (Cal. App. 1994). It is worth noting that in its *amicus* brief here, the State of California does not advance the view that *R.A.V.* is properly understood as stating a general rule with three definite exceptions, but rather advances a view similar to that advanced in this Brief, that the passage in *R.A.V.* from which these purported "exceptions" are drawn is better understood merely as articulating, with examples, a general justification for content-based discrimination within a class of proscribable speech. See Brief of Amicus Curiae State of California at 4, n.3.

Virginia's reading of *R.A.V.* is simplistic and erroneous, over-reading isolated passages, and turning the Court's explanatory discussions into hard-edged and stylized "exceptions" far more sweeping than any plausible reading of the case will bear. It trivializes the import of this Court's ruling in *R.A.V.* to reduce it to a sterile rule with three loopholes so elastic that they utterly undermine the integrity of the rule. More significantly, Virginia's argument fails to comprehend the gist of the real issue faced by the Court in *R.A.V.*, and the relationship of that issue to the flow of First Amendment doctrine that proceeded the *R.A.V.* opinion.[23]

B. The "Secondary Effects" Doctrine has No Place Here

This Court's discussion in *R.A.V.* of the "secondary effects" doctrine was not, as Virginia claims, an "exception" to the presumptive rule against content and viewpoint discrimination, but rather a discussion by this Court of the "secondary effects" doctrine as an example of content-neutral laws, a discussion intended as a *foil* for the kind of content and viewpoint discrimination struck down in *R.A.V.* Virginia's claim here that its cross-burning law reaches only "secondary effects" is an attempt to extend the secondary effects doctrine in a manner this Court has clearly rejected. Once again Virginia confuses ulterior motive with surface means. The secondary effects doctrine of *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986), and its progeny is grounded in the supposition that regulation of sexually-oriented adult establishments may be justified because such businesses

---

[23] It should be noted here that the entire discussion in *R.A.V.* regarding content-based subclasses of otherwise proscribable speech is technically *dicta*. This point is made not to diminish its importance, but to further emphasize that it is inappropriate to treat the Court's explanatory discussion as intended to authoritatively address (let alone resolve) conflicts presented by every future wrinkle in which the issue might again arise.

often attract other social ills such as crime or prostitution. *See, e.g., Renton*, 475 U.S. at 47-49; *City of Los Angeles v. Alameda Books, Inc.*, 122 S.Ct. 1728, 1734 (2002); *City of Erie v. Pap's A.M.*, 529 U.S. 277, 298-99 (2000). The secondary effects doctrine therefore posits that the social harm at which the government regulation at issue is aimed flows not from the communicative impact of the speaker's message, but from harms extraneous to that communicative impact, harms that tend to correlate with certain types of speech activity.

When the communicative impact of the expressive activity is what causes the alleged harm, however, the secondary effects doctrine may not be invoked. *See, e.g., United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, 815 (2000) ("We have made clear that the lesser scrutiny afforded regulations targeting the secondary effects of crime or declining property values has no application to content-based regulations targeting the primary effects of protected speech. . . .The statute now before us burdens speech because of its content; it must receive strict scrutiny."); *Boos v. Barry*, 485 U.S. 312, 321 (1988) ("Listeners' reactions to speech are not the type of 'secondary effects' we referred to in *Renton*."); *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 535, 574 (2001) (Thomas, J., concurring)("[T]he ordinance in *Renton* was aimed not at expression, but at the 'secondary effects' caused by adult businesses. The regulations here are very different. Massachusetts is not concerned with any 'secondary effects' of tobacco advertising--it is concerned with the advertising's primary effect, which is to induce those who view the advertisements to purchase and use tobacco products."). Plainly, it is the communicative impact of a burning cross that allegedly engenders intimidation. Virginia's entire case is otherwise incoherent. The secondary effects doctrine simply has no place here.

C. The Cross-Burning Law Cannot be Saved as a Regulation of "Especially Virulent" Intimidation

In an remarkable passage, Virginia in its Brief actually places in bold typeface the "message" that it claims is communicated by cross-burning.[24] Virginia then argues that because this message, apparently endemic to cross-burning, is "especially virulent," the State is entitled to ban it under an "exception" in *R.A.V.* supposedly approving of content or viewpoint discrimination for such especially dangerous messages.

This completely mis-reads *R.A.V.*, both on its own terms, and against the backdrop of its place in the evolution of this Court's First Amendment doctrines. To place *R.A.V.* in its proper context, it is important at the outset to recognize that this Court was confronted in that case with an argument that certain categories of expression are *entirely* outside the protection of the First Amendment. This categorical approach, which the Court in *R.A.V.* appropriately labeled "a simplistic, all-or-nothing-at-all approach to First Amendment protection," *id.* at 384, dated back to a famous passage in *Chaplinsky v. New Hampshire*,

---

[24] See Brief of Petitioner at 35. ("The Message of a cross burning is this: ***We may kill you, or hurt you badly. Believe it. We have already come to your home, and we have done this hateful and dangerous thing in front of you. So, we don't just talk. We act. Next time we may torch your home. Or bomb your car. Or shoot into your windows. No one stopped us when we burned the cross. No one will stop us next time either. Fear us.***"). Virginia's claim that this is what cross-burning means is astonishing in many respects. To begin, there is nothing in the record in the Black, Elliott, or O'Mara cases to support the proposition that this is what either of the two cross-burning episodes in contest here communicated. Secondly, Virginia's statement is a manifest admission that it *is* the communicative impact of cross-burning (whatever that impact may be) that the law seeks to regulate, an admission that simultaneously exposes the law as content-based and disqualifies it from the shelter of any plausible "exception" recognized in *R.A.V.*

315 U.S. 568, 572 (1942). In words that are often quoted, the Court in *Chaplinsky* stated:

> There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which has never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or 'fighting' words--those which by their very utterance inflict injury or tend to incite an immediate breach of the peace. It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.

Id. at 571-72. This passage from *Chaplinsky* seemed to invite a mechanical approach to all First Amendment problems, creating a "list" of taboo categories. Speech falling within one of the categories was not protected at all by the First Amendment, speech not falling within one of the categories was.

This Court in *R.A.V.* was forced to contend with the categorical approach that had descended from *Chaplinsky* because the Minnesota Supreme Court had construed the statute in *R.A.V.* as limited to "fighting words," and thus as falling within a class of proscribable speech. If the St. Paul ordinance fell within the "fighting words" category, the argument went, then it was completely *immune* from First Amendment attack, essentially "invisible" to the Constitution. It was against this backdrop that the Court in *R.A.V.* went to such elaborate length to reconcile the often repeated language from *Chaplinsky* with the far more complex and protective understanding of First Amendment

principles that had evolved since *Chaplinsky* was decided in 1942. In the course of that discussion the Court repudiated the mechanistic "all-or-nothing-at-all" approach, describing it as "no more literally true than is the occasionally repeated shorthand characterizing obscenity as 'not being protected at all.'" *R.A.V.*, 505 U.S. at 383.

This Court's rejection of the categorical approach to First Amendment law in *R.A.V.* was undoubtedly sound, and ought not be revisited. The *Chaplinsky* method invites a mere surface manipulation of labels, entirely failing to engage the competing interests posed by the many and various conflicts that arise in modern free speech cases. And purely as a descriptive matter, the *Chaplinsky* methodology cannot be reconciled with the large body of cases that have been decided since, cases that have consistently found that First Amendment protection *does* extend, at least in part, to speech nominally falling within one of *Chaplinsky*'s categories. Sexually explicit material that might fairly be described as "lewd and obscene" now receives substantial First Amendment protection, depending on the circumstances and method of regulation,[25] speech that is merely "profane" in the sense of being vulgar or blasphemous is now recognize as entirely protected,[26] speech that is "libelous" now receives vast First Amendment protection, particularly when it involves public officials or public figure plaintiffs or issues of public concern,[27] and the "fighting words" doctrine, while still

---

[25] *See, e.g., Reno v. American Civil Liberties Union*, 521 U.S. 844, 874 (1997) ("In evaluating the free speech rights of adults, we have made it perfectly clear that '[s]exual expression which is indecent but not obscene is protected by the First Amendment'") (*quoting Sable Communications of Cal., Inc. v. FCC*, 492 U.S. 115, 126 (1989); *Stanley v. Georgia*, 394 U.S. 557 (1969) (protecting private possession of obscene material in the home).

[26] *See, e.g,, Cohen v. California*, 403 U.S. 15 (1971); *Joseph Burstyne, Inc. v. Wilson*, 343 U.S. 495 (1952); *Hustler Magazine v. Falwell*, 485 U.S. 46 (1988).

[27] *See, e.g,, New York Times Co. v. Sullivan*, 376 U.S. 354 (1964).

alive, has been significantly honed and narrowed by being brought into harmony with the highly protective intent and immediacy standards emanating from cases such as *Brandenburg v. Ohio*, 395 U.S. 444 (1969).

If the categorical "all-or-nothing-at-all" approach was demonstrably unsound, however, merely announcing that proposition was not enough to dispose of the problem posed by *R.A.V.*, for the Court still had to confront the fact that the Minnesota Supreme Court had, after all, placed the St. Paul Ordinance within what appeared to be a narrow and thus constitutionally acceptable definition of "fighting words." It was here that *R.A.V.* added its own important elaboration to First Amendment doctrine, announcing that the powerful First Amendment presumptions against content and viewpoint discrimination apply even to speech falling within a category of speech that may otherwise be proscribed. What was so powerful about this Court's ruling in *R.A.V.* was its holding that even if the law were otherwise valid as a proscription against incitement or "fighting words," it could still be unconstitutional if infected with content or viewpoint discrimination. *R.A.V.*, 505 U.S. at 390-96.

In explaining its position, however, there was still work to do, for the proposition embraced by the Court in *R.A.V.* seemed to be in tension with a number of First Amendment principles that appeared to permit the drawing of content-based lines to define subclasses of proscribed speech within the boundaries of larger categories of permissible proscription. It was in the context of this seeming contradiction that the Court explained, first, that speech falling within proscribed classes was not "invisible" to the Constitution, and second, that examples of *permissible* discrimination within the parameters of a proscribed class were highly limited, and were always confined *either* to lines drawn on the basis of the same criteria that justified proscribing speech in the larger class, or to lines that were

not in fact content-based (such as lines drawn under the "secondary effects" doctrine).

It was thus in the course of this explanation that the Court embarked on its discussion of classes and subclasses of proscribable speech, establishing the crucial distinction between the use of content in a manner that is gratuitous in relation to the rationale justifying proscription of the entire class, and the use of content in a manner that merely applies the identical rationale to some narrower set of circumstances. This was the whole point of the insistence in *R.A.V.* that merely because speech happens to fall within a class that is traditionally viewed as proscribable (such as obscenity, or defamation, or fighting words) it does not thereby become "speech entirely invisible to the Constitution." *Id.* at 383. Instead, such speech *remains* visible to the Constitution, and the strong constitutional prohibitions against content and viewpoint discrimination. Such speech loses its constitutional protection *only* for reasons that are in full alignment with the rationale that justified proscription in the first instance.

The flaw here in Virginia's reading of *R.A.V.* is its failure to comprehend what this Court meant when it stated, in a pivotal passage:

> When the basis for the content discrimination consists entirely of the very reason the entire class of speech at issue is proscribable, no significant danger of idea or viewpoint discrimination exists. Such a reason, having been adjudged neutral enough to support exclusion of the entire class of speech from First Amendment protection, is also neutral enough to form the basis of distinction within the class.

R.A.V., 505 U.S. at 388. The key to understanding this passage is its requirement that the "basis for the content

discrimination consists *entirely of the very reason* the entire class of speech at issue is proscribable." *Id.* (emphasis added). What *R.A.V.* requires is complete continuity between the line drawn to define the subclass and the line drawn to define the broader class. What *R.A.V.* forbids is discontinuity.[28]

There are, as *R.A.V.* acknowledged, some categories of speech that are proscribed at least in part *because* of their content. Under the regime of *Miller v. California*, 413 U.S. 15 (1973), for example, obscenity is deemed proscribable because of its content, including its prurience, offensiveness, or lack of serious redeeming value. The same may be said of the law of defamation.[29] This Court in *R.A.V.* carefully explained that there is nothing offensive to the First Amendment in laws that *narrow* the reach of obscenity or defamation by using criteria "entirely the same" as those used to define those categories of speech generally. What *R.A.V.* emphatically insisted, however, was that the government *not* make these categories "vehicles for content discrimination unrelated to their distinctly proscribable content." *R.A.V.*, 505 U.S. at 383-84. Thus a "State might choose to prohibit only that obscenity which is the most patently offensive *in its prurience--i.e.*, that which involves

---

[28] *R.A.V.*, 505 U.S. at 385 ("nonverbal expressive activity can be banned because of the action it entails, but not because of the ideas it expresses--so that burning a flag in violation of an ordinance against outdoor fires could be punishable, whereas burning a flag in violation of an ordinance against dishonoring the flag is not."), citing *Texas v. Johnson*, 491 U.S. at 406-407.

[29] Defamation doctrines would be incomprehensible without reference to content distinctions, such as whether the allegedly defamatory material is opinion or fact, true or false, merely mocking or actually injurious to reputation. *See, e.g., Milkovich v. Loraine Journal Co.*, 497 U.S. 1 (1990) (requiring that speech be factual); *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767 (1986) (imposing burden of proving falsity on plaintiffs in cases involving issues of public concern); *Hustler Magazine v. Falwell*, 485 U.S. 46 (1988) (striking down award of damages for infliction of emotional distress when material contained no false fact injurious to reputation).

the most lascivious displays of sexual activity. But it may not prohibit, for example, only that obscenity which includes offensive *political* messages." *Id.* at 388. So too, "the government may proscribe libel but it may not make the further content discrimination of proscribing *only* libel critical of the government." *Id.* at 384. Similarly, the government could choose to criminalize only those threats of violence that are directed against the President, "since the reasons why threats of violence are outside the First Amendment (protecting individuals from the fear of violence, from the disruption that fear engenders, and from the possibility that the threatened violence will occur) have special force when applied to the person of the President." *Id.* at 388 (*citing Watts v. United States*, 394 U.S. 705, 707 (1969)). However, the Court observed, the government "may not criminalize only those threats against the President that mention his policy on aid to inner cities." *R.A.V.*, 505 U.S. at 388.

Once the dichotomy between subclasses defined in parallel to the defining characteristics of the broader class and subclasses defined for reasons extraneous to those characteristics is understood, the constitutional defect in Virginia's cross-burning law is rendered apparent. As *R.A.V.* itself made clear, the rationale for permitting the proscription of speech falling within the class of "true threats" is to protect "individuals from the fear of violence, from the disruption that fear engenders, and from the possibility that the threatened violence will occur." *Id.* at 388.

The cross, however, is a communicative symbol, highly charged with religious, historical, social, and political meanings. The burning of a cross, like the burning of the flag, or the effigy of a political leader, intentionally plays on those religious, historical, social, and political meanings to add emotional and psychological intensity to the message, a message likely to be seen by many onlookers as perversion, blaspheme, or sacrilege. Admittedly, it may also be seen, in

a given time and place, as a true threat. But it cannot plausibly be maintained (as the United States, for example, admits) that *every* act of cross-burning is a threat.[30] Virginia's law thus does not merely define a subclass partaking of elements generic to all threats, but rather instead introduces a further content distinction, the burning of one symbol heavily laden with expressive connotations and meanings.

To put the point another way, compare a law targeting threats against the President with a law targeting threats accomplished through cross-burning. The two are not equivalent. The law targeting threats against the President creates a subclass within the broad category of threats geared to the *identity* of the intended victim--the President--and grounded in the policy judgment that such a threat is especially dangerous and damaging to the polity. The presidential threat law contains no additional and gratuitous reference to any particular symbol or message; it bans all threats directed one identified victim. Indeed, the law does not target expression *as such*, but merely targets the conduct of threatening a specific target, the President. That speech might be used to establish a violation of the law is merely an application of the principle that the mere evidentiary use of speech to establish illegal intent does not violate the First Amendment. *See Wisconsin v. Mitchell*, 508 U.S. at 477. A cross-burning law, in contrast, does not focus

[30] Virginia at times seems to echo this concession. With regard to its prosecution of Barry Elton Black, Virginia repeatedly makes the point that it would have been permissible for Black and his fellow Klan members to burn their cross if they had selected a spot on the farm from which the burning cross would not have been visible to others. Virginia seems to be saying that expression is fine, as long as nobody sees it.

exclusively on intent, or on victim-identity, but on the invocation of a specific symbol.[31]

D. The Law is Not Saved on the Theory that it was Not Passed to Suppress Ideas

In a final catch-all argument, Virginia claims that under *R.A.V.* content and viewpoint discrimination are excusable when, in the words of *R.A.V.*, "there is no realistic possibility that official suppression of ideas is afoot." *R.A.V.*, 505 U.S. at 390. Virginia's understanding of this isolated passage in *R.A.V.* is that as long as its *underlying* motivations were the altruistic goals of sheltering citizens from fear and maintaining law and order, the law is constitutional. If this is all that *R.A.V.* means, it means nothing. If this were what *R.A.V.* held, the case would have come out the other way.

Virginia's final catch-all argument is a reprise of the position it advances throughout its Brief. While Virginia and its supporting *amici* cast their arguments under the rubric of many different First Amendment doctrines, at their core they all loop back on the same rationales and fail for the same reasons. The pivotal question here, cutting across all the different legal arguments promoted by Virginia and its *amici*, is whether the statute's focus on cross-burning is sufficient to render it content-based or viewpoint-based.

The truism that threats are not protected by the First Amendment just does not dispose of this case. And however much the Virginia protests, under our First Amendment traditions to single out for special treatment one symbol in this manner *does* pose a danger that suppression of ideas is afoot. When a legislative body uses

[31] Thus if a new presidential threat law were enacted, which made reference to some specific symbol or message, targeting, for example, threats against the President carried out in the name of Islam, or through the use of a swastika, or by the use of a burning cross or a burning flag, such a law would run afoul the viewpoint-neutrality principle of *R.A.V.*

language to define its expressive target, it is relatively simple to locate and identify with precision the nature of the offending viewpoint discrimination. When a legislative body uses a *symbol* to define its expressive target, the nature of the viewpoint discrimination is often less determinate, as symbols themselves are often less determinate, conjuring up a wider range of meanings. Yet the First Amendment reaches both forms of discrimination. Virginia's cross-burning law stands in no better constitutional position than would a law prohibiting intimidation through flag-burning. The First Amendment does not permit Virginia to reify revulsion and outrage, bringing into play the punitive machinery of its criminal law to silence a message most citizens find disturbing or upsetting. "Among free men, the deterrents ordinarily to be applied to prevent crime are education and punishment for violations of the law, not abridgment of the rights of free speech. *"Whitney v. California*, 274 U.S. 357, 376 (1927) (Brandeis, J., concurring). *See also Kingsley Int'l Pictures Corp. v. Regents of Univ. of N.Y.*, 360 U.S. 684, 689 (1959) (same).

We have staked our fortune and future in this country on the transcendent value of freedom of speech, and the wisdom "that fear breeds repression; that repression breeds hate; that hate menaces stable government; that the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies; and that the fitting remedy for evil counsels is good ones." *Whitney v. California*, 274 U.S. at 375 (Brandeis, J., concurring). Our First Amendment tradition rests on the faith that tolerance fosters resiliency, that the open venting of inflamed expression displaces more violence than it triggers, and that free speech dissipates more hate than it stirs.

The fitting remedy for disturbing messages of racial hatred are the healing messages of racial tolerance. As Justice Oliver Wendell Holmes admonished, "we should be eternally vigilant against attempts to check the expression of opinions that we loathe and believe to be fraught with

death, unless they so imminently threaten immediate interference with the lawful and pressing purposes of the law that an immediate check is required to save the country." *Abrams v. United States*, 250 U.S. at 630 (Holmes, J., dissenting). Virginia's cross-burning law strikes at the heart of these First Amendment principles.

III. THE PRIMA FACIE EVIDENCE PROVISION VIOLATES THE FIRST AMENDMENT

A. The Prima Facie Evidence Provision Operates as an *In Terrorem* Chill on Protected Expression that Renders it Overbroad

The prima facie evidence provision of the Virginia cross-burning statute multiplies the unconstitutionality of the law in numerous ways. The provision exacerbates the content and viewpoint discrimination embedded in the statute, it enables the State to obtain convictions through shortcuts the modern First Amendment does not allow, and it operates as an *in terrorem* prosecutorial threat that chills a substantial range of constitutionally protected expression, rendering it overbroad.[32]

In its discussion of the prima facie evidence provision, the Supreme Court of Virginia observed: "It is not simply the prospect of conviction under the statute that renders it overbroad. The enhanced probability of

---

[32] Virginia in the final two pages of its Brief argues that if this Court does find the prima facie evidence provision of the cross-burning statute unconstitutional, it should sever that provision of the statute from the main body of the law. Virginia did not make this argument for severance in the Supreme Court of Virginia, and under the normal practices of this Court the argument has been waived. Moreover, severance here would be a judicial act undertaken in an abstract vacuum, for it would not alter the outcomes of the cases or controversies before this Court. *These* defendants were convicted under the statute *as written*. Obviously they cannot be convicted under a new statute rewritten *nunc pro tunc* by this Court and applied against them retroactively.

prosecution under the statute chills the expression of protected speech sufficiently to render the statute overbroad." *Black v. Commonwealth of Virginia*, 262 Va. 764, 777, 553 S.E.2d 738, 746 (2001), J.A 284. The Supreme Court of Virginia thus deemed the statute overbroad *both* because of the prospect of conviction (the issue that took up the bulk of the Court's substantive discussion in the main part of its opinion, dealing with *R.A.V.*), and because of the enhanced prospect of prosecution.

The overbreadth doctrine prohibits the government from banning unprotected speech if a substantial amount of protected speech is prohibited or chilled in the process. *Broadrick v. Oklahoma*, 413 U.S. 601, 612 (1973)("[T]he possible harm to society in permitting some unprotected speech to go unpunished is outweighed by the possibility that protected speech of others may be muted."). As the Supreme Court of Virginia held:

> [T]he act of burning a cross alone, with no evidence of intent to intimidate, will nonetheless suffice for arrest and prosecution and will insulate the Commonwealth from a motion to strike the evidence at the end of its case-in-chief. That the trier of fact ultimately finds the actor not guilty of the offense is little consolation after arrest and prosecution for speech or expressive conduct that is otherwise protected. Arrest for, and prosecution of, otherwise protected speech, with no evidence of a critical element of the offense other than a statutorily supplied inference, chills free expression.

Black v. Commonwealth of Virginia, 262 Va. 764, 778, 553 S.E.2d 738, 746 (2001), J.A 284-85. Although Virginia derides its Supreme Court on this point, the Court's argument is both entirely sound as doctrine and eminently resonate as

theory. Very much the same argument was adopted, in a different statutory context, by this Court in *Ashcroft v. Free Speech Coalition*, 122 S.Ct. 1389 (2002), in which it confronted the claim that a federal statute banning "virtual" child pornography merely operated as a burden-shifting device, leaving defendants free to extricate themselves by proving that the speech at issue was not unlawful. This Court found that such a process turns the First Amendment on its head, largely because a defendant must face the chilling effect of prosecution and potential felony conviction unless able to prove that his conduct in fact falls outside the prohibition. *Id.* at 1404. ("The Government raises serious constitutional difficulties by seeking to impose on the defendant the burden of proving his speech is not unlawful. An affirmative defense applies only after prosecution has begun, and the speaker must himself prove, on pain of a felony conviction, that his conduct falls within the affirmative defense.").

B. The Prima Facie Evidence Provision Violates the Procedural Principle Established in *Stromberg v. California* Prohibiting General Verdicts that May have Been Based on Protected Symbolic Expression

The constitutional defect in the prima facie evidence provision is further illuminated by one of the earliest symbolic speech cases decided by this Court, *Stromberg v. California*, 283 U.S. 359 (1931), striking down a conviction under a California statute that made it a crime to display a red flag as an emblem of opposition to organized government or as an invitation to anarchy or sedition. The Court in *Stromberg* assumed that the First Amendment does permit "the punishment of those who indulge in utterances which incite to violence and crime and threaten the overthrow of organized government by unlawful means." *Id.* at 369. The jury in the case, however, had been

instructed that they could convict the defendant Yetta Stromberg not merely for having engaged in such unprotected activity, but also for display of her red flag "as a sign, symbol, or emblem of opposition to organized government." *Id.* The Court found this constitutionally offensive, because it might be construed to include a proscription on peaceful and orderly opposition to government. *Id.* Because it was impossible to discern from the jury's general verdict whether the jury's determination of Stromberg's guilt rested on a finding of genuine incitement or threats of violence, or instead on the mere brandishing of the symbol of opposition alone, the Court held that the entire conviction must be overturned. *Id.* at 367-68.

C. The State May Not Through Fiat Brand a Specific Symbol as Presumptively Crossing the Constitutional Line that Separates Abstract Advocacy from Lawless Action

A central distinction in modern First Amendment law is the line that divides mere "abstract advocacy" from actual lawless action. In dealing with the relationship between violent speech and violent action, modern First Amendment jurisprudence employs a variety of legal doctrines that work in essentially parallel ways to separate mere violent rhetoric from speech closely intertwined with violence. The incitement standard of *Brandenburg v. Ohio*, 395 U.S. 444 (1969), the "fighting words" doctrine as it has now been narrowed through holdings such as *Cohen v. California*, 403 U.S. 15 (1971), and the "true threat" doctrine of *Watts v. United States*, 394 U.S. 705 (1969), all operate in much the same fashion, working in combination to protect violent or offensive rhetoric while permitting the

government to move against speech connected in some more direct and palpable sense to violent conduct.[33]

The core flaw of the prima facie evidence provision is that it short-circuits this central First Amendment distinction, compounding the content and viewpoint discrimination by extracting the teeth from the required element of intentional intimidation, rendering it a "now you see it now you don't" requirement. The provision instructs law enforcement officers, prosecutors, trial judges, and

---

[33] Many other decisions of this Court reinforce this line between violent rhetoric and violent action. *See, e.g, Ashcroft v. Free Speech Coalition*, 122 S.Ct.1389, 1403 (2002) ("To preserve these freedoms, and to protect speech for its own sake, the Court's First Amendment cases draw vital distinctions between words and deeds, between ideas and conduct."); *Bartnicki v. Vopper*, 532 U.S. 514, 529 (2001) ("The normal method of deterring unlawful conduct is to impose an appropriate punishment on the person who engages in it."); *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 894 (1982)(Despite the fact that "[i]ntimidation, threats, social ostracism, vilification, and traduction were some of the devices used by the defendants to achieve the desired results," this Court held that the speech of the defendant Charles Evers was constitutionally protected, including a statement that "If we catch any of you going in any of them racist stores, we're gonna break your damn neck," noting that "[t]he emotionally charged rhetoric of Charles Evers' speeches did not transcend the bounds of protected speech set forth in *Brandenburg*" and that "[s]trong and effective extemporaneous rhetoric cannot be nicely channeled in purely dulcet phrases. An advocate must be free to stimulate his audience with spontaneous and emotional appeals for unity and action in a common cause. When such appeals do not incite lawless action, they must be regarded as protected speech. To rule otherwise would ignore the "profound national commitment" that "debate on public issues should be uninhibited, robust, and wide-open.") (*quoting New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1969)); *Hess v. Indiana*, 414 U.S. 105 (1973) (overturning conviction of anti-war protestor for vulgar statement that the protesters would re-take a street "later" because the threatened lawless action was not immediate).

juries that nothing beyond the mere burning of the cross in *required* to sustain an arrest, prosecution, or conviction.[34]

Virginia argues that its law poses no danger to free speech because it must always prove intent to intimidate. But under the prima facie evidence provision, this is mere illusion. *Brandenburg* held that "the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action."[35] The *Brandenburg* standard need not be satisfied under the Virginia statute,

[34] The danger is not speculative. As the record in the Black case demonstrates, the arresting officers in the case understood the law as making it a crime to burn a cross in Virginia, period. J.A. 74 (Sheriff Warren Manning stating to Black: "there's a law in the State of Virginia that you cannot burn a cross and I'll have to place you under arrest for this . . .").

[35] The Supreme Court of Virginia ruled, appropriately, that in light of its holding that the cross-burning law was void on its face because it suffered from impermissible content and viewpoint discrimination, it need not reach and resolve the *Brandenburg* arguments advanced by the Respondents, including Respondent Black's "as applied" challenge. The *Brandenburg* case, however, remains in play as an important First Amendment precedent germane to the question that *is* before this Court, just as *Brandenburg* was germane in *R.A.V. See R.A.V.*, 505 U.S. at 402, n.4 (White, J., concurring) ("This does not suggest, of course, that cross burning is always unprotected. Burning a cross at a political rally would almost certainly be protected expression. *Cf. Brandenburg v. Ohio*, . . . But in such a context, the cross burning could not be characterized as a 'direct personal insult or an invitation to exchange fisticuffs,' *Texas v. Johnson*.") (internal citations omitted). The Question Presented in this Court's grant of *certiorari* therefore does fairly include the issue of whether the prima facie evidence standard violates the First Amendment by in effect relieving Virginia of the actual burden of satisfying the evidentiary standards required by the First Amendment under decisions such as *Brandenburg* or *Watts*.

however, and in Black's case below, the trial court refused to allow Black a *Brandenburg* jury instruction. J.A. 142-46. The *Watts* "true threat" test requires a case-by-case inquiry into whether a threat is real or mere rhetoric, but the prima facie evidence provision eliminates the bother.[36] Cases such as *Cohen* teach that modern "fighting words" prosecutions require a face-to-face immediacy akin to (if not, indeed, identical to) the *Brandenburg* standard, but no such showing is necessary under the Virginia law.[37]

Certainly the protections of cases such as *Brandenburg*, *Watts*, or *Cohen* are not so chimerical that they can be defeated by such wispy sleight-of-hand. What these decisions require is a rigorous case-by-case inquiry into the nexus between speech and crime, performed in the first instance by the jury and trial court, and then subject to the rigors of independent appellate review. Virginia cannot

[36] In *Watts v. United States*, 394 U.S. 705 (1969), Watts was convicted of willfully making a threat to take the life of the President during a public rally at the Washington Monument for statements such as "[i]f they ever make me carry a rifle the first man I want to get in my sights is L.B.J." *Id.* at 706. The Court summarily reversed Watts' conviction, holding that the statement, taken in context, was "a kind of very crude offensive method of stating a political opposition to the President" and protected by the First Amendment. *Id.* at 708.

[37] When this Court first used the phrase "fighting words" in *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942), it seemed to encompass two distinct types of language, words "which by their very utterance inflict injury" and words that "tend to incite an immediate breach of the peace." *Id.* at 571-72. Modern First Amendment cases reject the first form of fighting words, to the extent that the state may condemn the *mere utterance* of some phrase or the mere brandishing of some symbol on the theory that standing alone, without proof of more, it "inflicts injury." Cases such as *Cohen v. California* 403 U.S. 15 (1971), instead limit the "fighting words" doctrine to "a direct personal insult" directed at the hearer. *Id.* at 20. This effectively makes the fighting words doctrine nothing more than a specific application of the immediacy requirement central to *Brandenburg*. *See also Gooding v. Wilson*, 405 U.S. 518 (1972) (overturning conviction for vulgar insult to police officer); *Lewis v. City of New Orleans*, 415 U.S. 130 (1974) (same).

simply label a symbol a presumptive threat and be done with it. A change in terminology is not a change in principle. Virginia insists that cross-burning is a shorthand for intimidation. Yet Cross-burning is not intimidation, any more than flag-burning is sedition, or an erotic movie is sex. Cross-burning is symbolic expression. At a given time and place a burning cross may be an instrument of intimidation, as an almost infinite variety of expression and conduct may, in context, be such an instrument. But Virginia cannot simply declare, through fiat, a presumptive equation between intimidation and one expressive ritual. Virginia's claimed shorthand is an unconstitutional shortcut.

This is not a quibble. The prima facie evidence provision affronts the First Amendment in a deeply offensive way, by in effect permitting the government to "brand" certain speech, in a kind of First Amendment variant of a Bill of Attainder, declaring it by name to be a message that presumptively violates the law. This type of advance "branding" was once permitted under our Constitution. It was exactly this method of regulation that drew one of Justice Holmes' great free speech dissents, in *Gitlow v. New York*, 268 U.S. 652 (1925), in which he argued vociferously against the proposition that the New York legislature could declare in advance that certain utterances constituted, intrinsically, a clear and present danger. In a haunting admonition, Justice Holmes warned: "Every idea is an incitement." *Id.* at 673 (Holmes, J., dissenting).

This branding device, however, is permitted no longer. The views of Justice Holmes have prevailed over time. This Court has now rejected the notion that a legislature may determine, in advance and in the abstract, that a certain word, symbol, or phrase is effectively taboo in

public discourse, attaching legal penalties to its mere utterance or display.[38]

---

[38] *See Landmark Communications v. Virginia, Inc.*, 435 U.S. 829, 843 (1978) ("This legislative declaration coupled with the stipulated fact that Landmark published the disputed article was regarded by the court as sufficient to justify imposition of criminal sanctions. Deference to a legislative finding cannot limit judicial inquiry when First Amendment rights are at stake."); *Cohen v. California*, 403 U.S. at 26 ("Finally, and in the same vein, we cannot indulge the facile assumption that one can forbid particular words without also running a substantial risk of suppressing ideas in the process. Indeed, governments might soon seize upon the censorship of particular words as a convenient guise for banning the expression of unpopular views."); *Herndon v. Lowry*, 301 U.S. 242, 258 (1937) ("The power of a state to abridge freedom of speech and of assembly is the exception rather than the rule and the penalizing even of utterances of a defined character must find its justification in a reasonable apprehension of danger to organized government. The judgment of the Legislature is not unfettered."); *Whitney v. California*, 274 U.S. 357, 279-80 (1927) (Brandeis, J., concurring) ("The legislative declaration .... does not preclude inquiry into the question whether, at the time and under the circumstances, the conditions existed which are essential to validity under the federal Constitution.").

CONCLUSION

For the reasons set forth, the judgment of the Supreme Court of Virginia should be affirmed.

Respectfully submitted,

Rodney A. Smolla
Counsel of Record
T.C. Williams School of Law
University of Richmond
Richmond, Virginia 23173
(804) 289-8197
(804) 287-1819 (fax)

David P. Baugh
Sara G. Davis
233 South Cherry Street
Richmond, Virginia 23241
(804) 643-8111

Rebecca K. Glenberg
Legal Director, American Civil Liberties Union of Virginia
6 North Sixth Street, Suite 400
Richmond, Virginia 23219
(804) 644-8080
Co-counsel for Respondent Barry Elton Black

Kevin E. Martingayle
Stallings & Richardson, P.C.
2101 Parks Avenue, Suite 801
Virginia Beach, Virginia 23451
(757) 422-4700
Counsel for Respondent Jonathan O'Mara

James O. Broccoletti
Zoby & Broccoletti, P.C.
6663 Stoney Point South
Norfolk, Virginia 23520
(757) 466-0750
Counsel for Respondent Richard J. Elliott